STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

REGINALD DALE LIGHT,

Defendant-Appellant.

UNPUBLISHED
August 28, 2007

No. 270211
Oakland Circuit Court
LC No. 05-204084-FC

Before: Davis, P.J., and Schuette and Borrello, JJ.

PER CURIAM.

Defendant was charged with felony murder (murder committed in the perpetration of a robbery), MCL 750.316(1)(b), and first-degree premeditated murder, MCL 750.316(1)(a). Following a jury trial, defendant was convicted of felony murder, MCL 750.316(1)(b), and the lesser offense of second-degree murder, MCL 750.317. Defendant was sentenced, as a second habitual offender, MCL 769.10, to life in prison for both convictions. We affirm defendant's conviction and sentence for felony murder, but are mandated to vacate defendant's conviction and sentence for second-degree murder, and remand for correction of the judgment of sentence.

This appeal arises from defendant's convictions for the death of Freddie Healey in April 1996. Mr. Healey was found face down on the floor of his clothing store business, with his hands handcuffed behind his back, with multiple stab wounds in his chest, and one incise wound on his neck. In 2004, using technology that was more advanced than the technology that was available in 1996, defendant's DNA was matched to several blood samples taken from the scene on the day Healey's body was discovered. Furthermore, defendant gave statements to police officers implicating himself in the robbery of defendant.

At the conclusion of defendant's trial and while the jury was deliberating, the trial court received a note from the jury asking, "If he is found innocent of this, can [sic] be charged with a lesser murder charge or is then [sic] a double-jeopardy in effect?" Defense counsel waived defendant's presence for the purpose of addressing this question and answer. After consulting with the attorneys, the trial judge sent the following note into the jury:

> Your job is to decide upon the possible verdict presented to you based upon evidence and the instructions. I have given you instructions on the law in this case. Those instructions do not address double jeopardy. That is because that

issue has no bearing on the decision you must make in this case. You must not speculate on what affect, if any, other laws may have on this case.

Shortly thereafter, the jury returned with their verdicts.

Defendant's first argument is that his constitutional and statutory right to be present during his trial was violated by the giving of a supplemental instruction to the jury outside of his presence. This issue is not properly preserved for review because defense counsel did not object to defendant's absence when the trial judge received a note from the jury and discussed the response with counsel. *People v Pipes*, 475 Mich 267, 277; 715 NW2d 290 (2006). The record reveals that defense counsel waived his client's presence for the purpose of addressing and answering the question. As such we treat this claim as an unpreserved claim of constitutional error, which are reviewed for plain error. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). To avoid forfeiture: 1) an error must have occurred, 2) the error must be clear or obvious, 3) and the error must have affected substantial rights, meaning it affected the outcome of the trial. *Id.* at 763 (citation omitted).

A criminal defendant has a statutory and constitutional right to be present in the courtroom at every stage of his trial where substantial rights might be adversely affected, including during the instructions to the jury. US Const, Am VI; Const 1963, art 1, § 20; MCL 768.3; *People v Mallory*, 421 Mich 229, 245-247; 365 NW2d 673 (1984). A defendant's absence from part of a trial requires reversal if there is a reasonable possibility of prejudice resulting from the absence. *People v Morgan*, 400 Mich 527, 536; 255 NW2d 603 (1977).

Defendant was present during the initial instructions to the jury, counsel for both sides stipulated to the instructions before they were given, and counsel for both sides indicated that there were no objections to the delivery of the instructions. Defense counsel also notified the trial judge that there was an article in that day's newspaper regarding the trial that contained some of defendant's criminal history. Defense counsel acknowledged that the court already ordered the jurors not to read or watch the news, and there was no reason to believe that they had not followed the orders. Defense counsel requested that the court remind the jurors of the instruction if the deliberations continued past that day. Nine minutes later, the jury reached a verdict.

Defendant asserts that he had the right to be present during the discussion of the response to the jury note because it was a supplemental instruction of a substantive nature. The court may not communicate with the jury regarding the case outside of the courtroom and the presence of counsel, and reversal is required if the communication was prejudicial. *People v France*, 436 Mich 138, 142-143, 159; 461 NW2d 621 (1990). A substantive communication includes supplemental instructions on the law given to a deliberating jury and is presumed to be prejudicial. *Id.* at 143, 163. An instruction placed on the record that is merely a recitation of an instruction originally given without objection rebuts this presumption. *Id*. at 163 n 34. In addition, the presumption is overcome when the trial court expresses its intent to communicate with the jury and counsel consents to the instruction. *Id*. at 163 n 34.

In this case, the trial court did not communicate with the jury outside the presence of defendant's counsel, so there is no presumption that defendant was prejudiced by the response to the jury. *France*, *supra* at 142-143. Counsel had input on the substance of the note. *Id*. at 163 n

34. The note merely told the jurors to base their decision on the previously given instructions, which defense counsel had approved, thus the note did not constitute a supplemental instruction on a matter of law. *Id*. There is no demonstration that defendant was prejudiced by the content of the response to the jury, the communication was not even in the actual presence of the jury where defendant's absence would be noticed, and there is no indication that defendant's presence would have affected the outcome of the trial.

Defendant also argues that his counsel could not waive his right to be present during the discussion of the instruction to the jury or the discussion regarding the newspaper article. A defendant's right to be present at his trial is personal and cannot be waived by defense counsel. *People v Montgomery*, 64 Mich App 101, 103; 235 NW2d 75 (1975). However, defendant was not prejudiced by his absence from the courtroom during the discussion because the response was not a supplemental instruction to the jury that would invoke defendant's right to be present. There was also no additional instruction given regarding the newspaper article. Because defendant had no right to be present, the issue of whether his counsel could waive that right is inapplicable.

Defendant's next argument is that the trial court erred in allowing the prosecution to introduce evidence that defendant possessed handcuffs at a home invasion that occurred almost two years after the murder in this case. A trial court's decision whether to admit evidence is reviewed for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). This Court defers to the trial court's judgment when the trial court chooses an outcome that falls within the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

Michigan Rule of Evidence 404(b) governs the admissibility of evidence of "other crimes, wrongs, or acts." *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). "Evidence of extrinsic crimes, wrongs, or acts of an individual generally is inadmissible in a criminal prosecution to prove that the defendant possessed a propensity to commit such acts." *People v Hall*, 433 Mich 573, 579; 447 NW2d 580 (1989). The purpose of this rule is to prevent a conviction based on defendant's history of misconduct rather than the facts of the present case. *Starr*, *supra* at 495. However, an exception exists where "the uncharged misconduct and the charged offense are sufficiently similar to support an inference that they are manifestations of a common plan, scheme, or system." *People v Sabin (After Remand)*, 463 Mich 43, 63; 614 NW2d 888 (2000).

To be admissible, evidence of other bad acts must be offered for a proper purpose, must be relevant, and its probative value must not be substantially outweighed by the potential for unfair prejudice. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Hall*, *supra* at 580.

The prosecution gave notice of its intent to introduce other act evidence regarding defendant's conviction for the 1998 home invasion to establish motive, intent, and plan or system. Defendant filed a motion to exclude evidence that defendant used handcuffs to restrain another person during a robbery a year and a half after the murder in this case. The prosecution argued that the evidence was a unique method of restraint during a robbery, showed motive and

intent, and showed a common scheme or plan. Defendant argued that the use of handcuffs was not unique, nobody was actually restrained in the subsequent case, so there was no evidence that the two crimes were performed in a similar manner, and the evidence would be too prejudicial. The court concluded that, pursuant to MRE 404(b), there was a similarity between the two acts to support an inference of a common plan, scheme, or system, the evidence demonstrated intent, and the probative value was not outweighed by unfair prejudice, so the prosecution was permitted to introduce the evidence.

Lenny Little testified that, on February 20, 1998, he and defendant were partners in a home invasion. Both Little and defendant carried handcuffs to the home invasion and planned to restrain the occupant, if they found him in the dwelling, and put him in the closet. Detroit police officer Michael Wilson testified that he arrested defendant and Little at the scene of the 1998 home invasion, and handcuffs were removed from defendant's person.

Defendant testified that he was a customer of Healey's store and went to the store to buy clothes on April 26, 1996. Defendant stated that he cut his hand either before he got to the store or after he was already inside and addressed the cut in the bathroom. Defendant paid for the clothes at the cash register and left. Defendant further testified that he became a bail enforcement officer in 1997 and possessed handcuffs in 1998 because of his job. Defendant pleaded guilty to the 1998 home invasion and served one year in county jail. Defendant told the police that he was "a stick-up man that used handcuffs to restrain people."

The testimony regarding the handcuffs was relevant because it was necessary to demonstrate that the circumstances of the two robberies were very similar, and defendant used handcuffs to restrain people while robbing them. This evidence discredited defendant's allegation that he was only in the store as a customer on the date of the incident and happened to have a cut on his hand. Therefore, it was offered for a proper purpose because it showed more than defendant's propensity to commit violent acts, and represented a common scheme or plan. This evidence was relevant to the identification of defendant as one of the robbers of Healey and his store, and its probative value was not substantially outweighed by the potential for unfair prejudice. *Knox*, *supra* at 509. Therefore, we hold that the trial court did not abuse its discretion in allowing the admission of testimony regarding defendant's similar acts.

Next, defendant contends that the prosecutor committed misconduct in his rebuttal argument by repeatedly denigrating the defense and that his counsel was ineffective for failing to object to these remarks. Defendant failed to preserve the issue of prosecutorial misconduct at trial because he did not object to the prosecutorial remarks, thereby depriving the trial court the opportunity to cure the error. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Therefore, this issue is reviewed for plain error. *Carines*, *supra* at 763-764.

To preserve the issue of ineffective assistance of counsel, a defendant must move for a new trial or evidentiary hearing. *People v Marji*, 180 Mich App 525, 533; 447 NW2d 835 (1989), citing *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). Defendant failed to move for a new trial or *Ginther* hearing with the trial court, so review is limited to the evidence on the record. *Ginther*, *supra* at 442-443. The determination whether defendant received the effective assistance of counsel is a question of both fact and constitutional law. The trial court's findings of fact are reviewed for clear error, while questions of law are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

In general, "[p]rosecutors are accorded great latitude regarding their arguments and conduct" and are "free to argue the evidence and all reasonable inferences from the evidence as it relates to [their] theory of the case." *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995) (citations omitted). Claims of prosecutorial misconduct are reviewed on a case-by-case basis to determine whether the defendant received a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). This Court examines the record and evaluates the remarks in context, taking into consideration defendant's arguments. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). A prosecutor may fairly respond to an issue raised by the defendant. *People v Fields*, 450 Mich 94, 110-111; 538 NW2d 356 (1995).

Defendant claims that the prosecutor made several improper remarks during the rebuttal argument. First, defendant takes issue with the prosecutor's comment that defense counsel clouded up the facts and muddied the waters, and the prosecutor was going to cleanse the water for the jury. The next comment at issue is the prosecutor's reference to the defense as a cockroach defense. Viewing these remarks in context, the prosecutor was fairly responding to defense counsel's closing argument. Defense counsel spent considerable time talking about the collection of the evidence at the scene as a "shoddy investigation," especially because the evidence technicians did not collect any of the blood around the body, just assuming that the blood was all Healey's, therefore losing any evidence of the killer. In addition, because there was no finding of defendant's blood near the body, the testimony was consistent with defendant's story.

In response, the prosecutor complimented defense counsel's argument and made the comment about cleansing the water to the jury to indicate that he planned to respond to the argument with a clear summary of the evidence that was presented to support the prosecution's case. During the prosecution's explanation of the evidence, he used an analogy of the defense mechanisms different animals in the animal kingdom use to survive and compared the defense argument to the way an octopus squirts a big cloud of dark ink to make it difficult to see. Then, the prosecutor continued that a variation would be the cockroach defense, where the facts can be contaminated by crawling around all over them until there's reasonable doubt. The prosecutor finished the analogy by concluding that defendant's instincts, because of who he is and where he is from, are to lie.

The prosecutor's reference to defendant's testimony as containing lies was reasonable because a prosecutor may argue that a witness is or is not worthy of belief based on the facts. *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996). "[T]he prosecutor is permitted, as an advocate, to make fair comments on the evidence, including arguing the credibility of witnesses to the jury when there is conflicting testimony and the question of defendant's guilt or innocence turns on which witness is believed." *People v Flanagan*, 129 Mich App 786, 796; 342 NW2d 609 (1983). In fact, defendant told a completely different story on the stand than he had ever told in the past and testified that he had lied to the police. Viewing these comments in context, it would be unreasonable to conclude that they affected defendant's right to a fair and impartial trial. *Watson*, *supra* at 586.

Finally, the court instructed the jury regarding what was included in the evidence, that the jury alone was the finder of facts, including determining the credibility of the witnesses, and that it must not let sympathy or prejudice influence its decision. Therefore, any possible error was dispelled by the court's instruction. *Bahoda*, *supra* at 281. Defendant was not deprived of a fair

trial by the prosecutor's remarks during the rebuttal argument. Because defendant's argument regarding this issue is without merit, defendant was also not denied the effective assistance of counsel. "Trial counsel is not required to advocate a meritless position." *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Finally, defendant argues that his convictions and sentences for two counts of murder arising from the death of a single person violate the constitutional prohibition against double jeopardy. Double jeopardy is an issue of constitutional law, and therefore, it is reviewed de novo. *People v Herron*, 464 Mich 593, 599; 628 NW2d 528 (2001).

The United States and Michigan Constitutions both contain clauses that prohibit putting a defendant twice in jeopardy for the same offense. US Const, Am V; Const 1963, art 1, § 15; *Herron*, *supra* at 599. The double jeopardy clause protects a defendant from both multiple prosecutions and multiple punishments for the same offense. *Id*. This case involves the prohibition of multiple punishments for the same crime. The purpose of this prohibition is to prevent a court from imposing a greater sentence than that intended by the legislature. *Hawkins v Department of Corrections*, 219 Mich App 523, 526; 557 NW2d 138 (1996). The legislature, on the other hand, is not limited in its capacity to establish punishments and may authorize cumulative punishments. *People v Meshell*, 265 Mich App 616, 628-629; 696 NW2d 754 (2005).

The federal test for multiple punishments is the *Blockburger*[1] test. *Meshell*, *supra* at 629. According to this test, if each offense contains an element not contained in the other, then a presumption arises that the legislature intended multiple punishments. If the elements of one offense are encompassed in the elements of the other, then the presumption is to the contrary. However, "this presumption is overcome when a legislature clearly expresses a contrary intent." *Id*.

In Michigan, legislative intent is determined by considerations of subject, language, and history of the statutes. *People v Denio*, 454 Mich 691, 708; 564 NW2d 13 (1997). There is a presumption that the legislature did not intend multiple punishments where two statutes prohibit violations of the same societal norm, or where they are part of a hierarchy of offenses in which the penalty is increased due to aggravating conduct. *Herron*, *supra* at 605; *Meshell*, *supra* at 630. However, if one of the offenses is completed before the other takes place, there is no double jeopardy violation even if they are part of a hierarchy. *People v Colon*, 250 Mich App 59, 63; 644 NW2d 790 (2002). If multiple punishments are found to violate double jeopardy, the remedy is to vacate the lesser charge. *Meshell*, *supra* at 633-634.

Under the both the federal and Michigan tests, defendant's convictions for both offenses violate double jeopardy. The elements of first-degree felony murder are: "(1) the killing of a human being, (2) malice, and (3) the commission, attempted commission, or assisting in the commission of one of the felonies enumerated in MCL 750.316(1)(b)." *People v Watkins*, 247 Mich App 14, 32; 634 NW2d 370 (2001). Robbery is an enumerated felony. MCL

[1] *Blockburger v United States*, 284 US 299; 52 S Ct 180; 76 L Ed 306 (1932).

750.316(1)(b). Second-degree murder consists of: "'(1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse.'" *People v Fletcher*, 260 Mich App 531, 559; 679 NW2d 127 (2004), quoting *People v Goecke*, 457 Mich 442, 463-464; 579 NW2d 868 (1998). The elements of second-degree murder are encompassed in first-degree felony murder, and the two offenses are part of a hierarchy. "Multiple murder convictions arising from the death of a single victim violate double jeopardy." *People v Clark*, 243 Mich App 424, 429; 622 NW2d 344 (2000) (citations omitted). Therefore, defendant's conviction and sentence for second-degree murder must be vacated. *Meshell*, *supra* at 633-634.

We affirm defendant's conviction and sentence for felony murder, vacate defendant's conviction and sentence for second-degree murder, and remand for correction of the judgment of sentence. We do not retain jurisdiction.

/s/ Alton T. Davis
/s/ Bill Schuette
/s/ Stephen L. Borrello